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S.105

Introduced by Senators Pearson, Benning, and Sirotkin

Referred to Committee on Judiciary

Date: February 28, 2017

Subject: Court procedure; arbitration; standard form contracts

Statement of purpose of bill as introduced: This bill proposes to prohibit forced arbitration of consumer disputes.

An act relating to consumer justice enforcement

It is hereby enacted by the General Assembly of the State of Vermont:

~~Sec. 1. 9 V.S.A. chapter 152 is added to read:~~

CHAPTER 152. MODEL STATE CONSUMER JUSTICE ENFORCEMENT

ACT; STANDARD FORM CONTRACTS

§ 6055. UNCONSCIONABLE TERMS IN STANDARD FORM

CONTRACTS

(a) Unconscionable terms. There is a rebuttable presumption that the following contractual terms are substantively unconscionable when included in a standard form contract to which only one of the parties to the contract is an individual and that individual does not draft the contract:

~~(1) A requirement that resolution of legal claims take place in an~~

1 ~~inconvenient venue. An inconvenient venue is defined for State law claims as~~
2 a place other than the county where the individual resides or the contract was
3 consummated, and for federal law claims as a place other than the federal
4 judicial district where the individual resides or the contract was consummated.

5 (2) A waiver of the individual's right to assert claims or seek remedies
6 provided by State or federal statute.

7 (3) A waiver of the individual's right to seek punitive damages as
8 provided by law.

9 (4) A requirement that the individual bring an action prior to the
10 expiration of the applicable statute of limitations.

11 (5) A requirement that the individual pay fees and costs to bring a legal
12 claim substantially in excess of the fees and costs that this State's courts
13 require to bring such a State law claim or that federal courts require to bring
14 such a federal law claim.

15 (b) Relation to common law and the Uniform Commercial Code. In
16 determining whether the terms described in subsection (a) of this section are
17 unenforceable, a court shall consider the principles that normally guide courts
18 in this State in determining whether unconscionable terms are enforceable.
19 Additionally, the common law and Uniform Commercial Code shall guide
20 courts in determining the enforceability of unfair terms not specifically
21 identified in subsection (a) of this section.

1 ~~(c) Severability. There is a rebuttable presumption that unconscionable~~
2 ~~terms in form contracts are not severable from the agreements in which they~~
3 ~~are situated, thus rendering the entire agreement unenforceable. In~~
4 ~~determining whether to sever an unenforceable term from a contract, the court~~
5 ~~shall consider the intent of the parties and whether the drafting party acted in~~
6 ~~bad faith.~~

7 (d) Unfair and deceptive act and practice. It is an unfair and deceptive
8 practice in violation of section 2453 of this title to include one of the
9 presumptively-unconscionable terms identified in subsection (a) of this section
10 in a standard form contract to which only one of the parties to the contract is
11 an individual and that individual does not draft the contract. Notwithstanding
12 any other provisions to the contrary, a party who prevails in a claim under this
13 section shall be entitled to \$1,000.00 in statutory damages per violation.

14 Sec. 2. 12 V.S.A. § 5652 is amended to read:

15 § 5652. VALIDITY OF ARBITRATION AGREEMENTS

16 (a) General rule. Unless otherwise provided in the agreement, a written
17 agreement to submit any existing controversy to arbitration or a provision in a
18 written contract to submit to arbitration any controversy thereafter arising
19 between the parties creates a duty to arbitrate, and is valid, enforceable and
20 irrevocable, except:

21 ~~(1) upon such grounds as exist for the revocation of a contract, and~~

1 ~~(2) as provided in 9 V.S.A. chapter 152~~

2 * * *

3 Sec. 3. 12 V.S.A. § 5667 is added to read:

4 § 5667. DATA DISCLOSURE REQUIREMENTS FOR ARBITRATION

5 ADMINISTRATORS

6 (a) Requirements.

7 (1) Any private company that administers five or more arbitrations a
8 year in this State involving a consumer or employee shall collect and publish
9 the following information about each of its arbitrations for at least five years
10 after the arbitration has completed:

11 (A) the names of the parties to the arbitration;

12 (B) the party that filed the arbitration claim;

13 (C) the type of dispute involved, including goods or services,
14 insurance, credit, debt collection, or employment;

15 (D) the prevailing party;

16 (E) whether the consumer or employee was represented by an
17 attorney;

18 (F) the date the company administering the arbitration received the
19 demand for arbitration, the date the arbitrator was appointed, and the date of
20 the arbitration's disposition;

21 (G) whether the arbitration resulted in an in-person hearing,

1 (H) whether the parties provided each other with any pre-hearing
2 discovery;

3 (I) the amount of the claim, the amount of the award, and any other
4 relief granted, if any;

5 (J) the name of the arbitrator, his or her total fee for the case, and the
6 percentage of the arbitrator's fee paid by each party; and

7 (K) the arbitrator's professional affiliations.

8 (2) Information published pursuant to this title must be updated at least
9 quarterly, and made available to the public in a computer-searchable format,
10 which shall be accessible at the website of the private company administering
11 the arbitrations, if any, and on paper upon request.

12 (3) No private company shall have any liability for collecting,
13 publishing, or distributing the information in accord with this section.

14 (b) Confidentiality. This section does not require disclosure of any
15 information other than that set forth in 9 V.S.A. chapter 152.

16 (c) Enforcement. Any private person and any public enforcement agency
17 responsible for enforcing State law under this section may bring suit for
18 injunctive relief against an entity that violates these provisions, and may
19 recover reasonable attorney's fees and other costs if an injunction or equivalent
20 relief is awarded. Injunctive relief is the only relief available in a suit arising
21 from failure to comply with this section.

1 ~~(d) Severability. Should a court decide that any provision of this section is~~
2 ~~unconstitutional, preempted, or otherwise invalid, that provision shall be~~
3 ~~severed, and such a decision shall not affect the validity of the section other~~
4 ~~than the provision severed.~~

5 Sec. 4. EFFECTIVE DATE

6 ~~This act shall take effect on July 1, 2017.~~

~~Sec. 1. 9 V.S.A. chapter 152 is added to read:~~

~~CHAPTER 152. MODEL STATE CONSUMER JUSTICE ENFORCEMENT
ACT; STANDARD-FORM CONTRACTS~~

~~§ 6055. UNCONSCIONABLE TERMS IN STANDARD-FORM
CONTRACTS PROHIBITED~~

~~(a) Unconscionable terms. There is a rebuttable presumption that the
following contractual terms are substantively unconscionable when included in
a standard-form contract to which only one of the parties to the contract is an
individual and that individual does not draft the contract:~~

~~(1) A requirement that resolution of legal claims take place in an
inconvenient venue. An inconvenient venue is defined for State law claims as a
place other than the state in which the individual resides or the contract was
consummated and for federal law claims as a place other than the federal
judicial district where the individual resides or the contract was consummated.~~

~~(2) A waiver of the individual's right to assert claims or seek remedies
provided by State or federal statute.~~

~~(3) A waiver of the individual's right to seek punitive damages as
provided by law.~~

~~(4) Pursuant to 12 V.S.A. § 465, a provision that limits the time in which
an action may be brought under the contract or that waives the statute of
limitations.~~

~~(5) A requirement that the individual pay fees and costs to bring a legal
claim substantially in excess of the fees and costs that this State's courts
require to bring such a State law claim or that federal courts require to bring
such a federal law claim.~~

~~(b) Relation to common law and the Uniform Commercial Code. In~~

~~determining whether the terms described in subsection (a) of this section are unenforceable, a court shall consider the principles that normally guide courts in this State in determining whether unconscionable terms are enforceable. Additionally, the common law and Uniform Commercial Code shall guide courts in determining the enforceability of unfair terms not specifically identified in subsection (a) of this section.~~

~~(c) Severability. If a court finds that a standard-form contract contains an illegal or unconscionable term, the court shall:~~

~~(1) refuse to enforce the entire contract or the specific part, clause, or provision containing the illegal or unconscionable term; or~~

~~(2) so limit the application of the illegal or unconscionable term or the clause containing such term as to avoid any illegal or unconscionable result.~~

~~(d) Unfair and deceptive act and practice. It is an unfair and deceptive practice in violation of section 2453 of this title to include one of the presumptively unconscionable terms identified in subsection (a) of this section in a standard-form contract to which only one of the parties to the contract is an individual and that individual does not draft the contract. Notwithstanding any other provisions to the contrary, a party who prevails in a claim under this section shall be entitled to \$1,000.00 in statutory damages per violation and an award of reasonable costs and attorney's fees.~~

~~(e) Each term found to be unconscionable pursuant to subsection (a) shall constitute a separate violation of this section.~~

~~(f) This section shall not apply to contracts to which one party is:~~

~~(1) regulated by the Vermont Department of Financial Regulation; or~~

~~(2) a financial institution as defined by 8 V.S.A. § 11101(32).~~

Sec. 2. 12 V.S.A. § 5652 is amended to read:

§ 5652. VALIDITY OF ARBITRATION AGREEMENTS

(a) General rule. Unless otherwise provided in the agreement, a written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties creates a duty to arbitrate, and is valid, enforceable and irrevocable, except:

(1) upon such grounds as exist for the revocation of a contract; and

(2) as provided in 9 V.S.A. chapter 152.

~~Sec. 2. EFFECTIVE DATE~~

~~This act shall take effect on October 1, 2019.~~

Sec. 1. 9 V.S.A. chapter 152 is added to read:

CHAPTER 152. MODEL STATE CONSUMER JUSTICE ENFORCEMENT
ACT; STANDARD-FORM CONTRACTS

§ 6055. UNCONSCIONABLE TERMS IN STANDARD-FORM
CONTRACTS PROHIBITED

(a) Unconscionable terms. There is a rebuttable presumption that the following contractual terms are substantively unconscionable when included in a standard-form contract to which one of the parties to the contract is an individual and that individual does not draft the contract:

(1) A requirement that resolution of legal claims take place in an inconvenient venue. As used in this subdivision, "inconvenient venue" includes for State law claims a place other than the state in which the individual resides or the contract was consummated, and for federal law claims a place other than the federal judicial district where the individual resides or the contract was consummated. Inconvenient venue shall not include the State or federal judicial district in which the individual suffered injury during the performance of the contract.

(2) A waiver of the individual's right to assert claims or seek remedies provided by State or federal statute.

(3) A waiver of the individual's right to seek punitive damages as provided by law.

(4) Pursuant to 12 V.S.A. § 465, a provision that limits the time in which an action may be brought under the contract or that waives the statute of limitations.

(5) A requirement that the individual pay fees and costs to bring a legal claim substantially in excess of the fees and costs that this State's courts require to bring such a State law claim or that federal courts require to bring such a federal law claim.

(b) Relation to common law and the Uniform Commercial Code.

(1) In determining whether the terms described in subsection (a) of this section are unenforceable, a court shall consider the principles that normally guide courts in this State in determining whether unconscionable terms are enforceable. Additionally, the common law and Uniform Commercial Code shall guide courts in determining the enforceability of unfair terms not specifically identified in subsection (a) of this section.

(2) When a party claims or it appears to the court that the contract or any clause within the contract is unconscionable, the parties shall be afforded a reasonable opportunity to present evidence regarding its commercial setting, purpose, and effect to aid the court in making a determination.

(c) Severability. If a court finds that a standard-form contract contains an unconscionable term, the court shall:

(1) so limit the application of the unconscionable term or the clause containing that term as to avoid any illegal or unconscionable result; or

(2) refuse to enforce the entire contract or the specific part, clause, or provision containing the unconscionable term.

(d) Unfair and deceptive act and practice.

(1) In an underlying legal dispute between the drafting and non-drafting parties in which the drafting party seeks to enforce one or more terms identified in subsection (a) of this section, and upon a finding that such terms are actually unconscionable, the court may also find that the drafting party has thereby committed an unfair and deceptive practice in violation of section 2453 of this title and may order up to \$1,000.00 in statutory damages per violation and an award of reasonable costs and attorney's fees.

(2) Each term the drafting party seeks to enforce that is found by the court to be actually unconscionable may constitute a separate violation of this section.

(e) Limitation on applicability. This section shall not apply to contracts to which one party is:

(1) regulated by the Vermont Department of Financial Regulation; or

(2) a financial institution as defined by 8 V.S.A. § 11101(32).

(f) Nothing in this chapter shall be construed to limit the application of 12 V.S.A. § 1037 (acceptance of inherent risks).

Sec. 1a. LEGISLATIVE INTENT

The General Assembly acknowledges that outdoor recreation is an important part of Vermont's economy and culture that encourages healthy communities and individuals, increases our connection to nature, enhances the Vermont lifestyle, and supports the attraction of high-quality employers and a sustainable workforce in all economic sectors. It is not the intent of the General Assembly to change the way courts allocate responsibility for the inherent risks of any outdoor recreational activity or sport.

Sec. 2. EFFECTIVE DATE

This act shall take effect on October 1, 2019.